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UNCLAS SECTION 01 OF 06 KYIV 000399

SENSITIVE  
SIPDIS

STATE FOR EB/TPP/IPE (TRMCGOWAN/JURBAN) AND EUR/UMB  
STATE PLEASE PASS TO USTR FOR PBURKHEAD/JGROVES/RBAE  
USDOC FOR ITA/MAC/OIPR - CPETERS  
USDOC FOR 4231/ITA/OEENIS/NISD - CLUCYCK  
COMMERCE PLEASE PASS TO USPTO AND CLDP  
SOFIA FOR MLAMBERTI

E.O. 12958: DECL: N/A

TAGS: [ETRD](#) [KIPR](#) [ECON](#) [UP](#)

SUBJECT: UKRAINE IPR: 2009 SPECIAL 301 -- POST INPUT

REFS: A) STATE 8410  
B) KYIV 360  
C) KYIV 292  
D) 2008 KYIV 2460  
E) 2008 KYIV 2265  
F) 2008 KYIV 1411  
G) 2008 KYIV 1056  
H) 2008 KYIV 821  
I) 2008 KYIV 503  
J) 2008 KYIV 456  
K) 2007 KYIV 348

SENSITIVE BUT UNCLASSIFIED; NOT FOR INTERNET PUBLICATION.

11. (SBU) Summary and Recommendation: Embassy recommends that Ukraine remain on the Special 301 Watch List. Ukraine has continued to make progress on IPR enforcement and therefore does not warrant a return to the Priority Watch List, but the GOU still has work to do before we should consider removing Ukraine from the Watch List altogether.

12. (SBU) The GOU has substantially improved its enforcement of IPR in recent years, in part to meet the requirements for accession to the World Trade Organization. Ukraine's IPR-related legal base is now in compliance with TRIPS and other international norms. Law enforcement bodies have also stepped up efforts to seize IPR-infringing goods and to prosecute those involved in their trade. Perhaps most importantly, illegal production of pirated and counterfeit goods has been halted almost completely. The GOU still faces serious IPR enforcement problems, however. Pirated optical discs and counterfeit goods remain widely available, particularly in large open-air markets throughout the country's larger cities. Industry reps estimate piracy levels for music and video at 60 percent, and for computer software at 84 percent. The transshipment of pirated and counterfeit goods, particularly optical discs produced in Russia, is a major challenge for Customs officials. Government procurement/use of unlicensed software remains a problem. Courts continue to hand down lax sentences for IPR infringers.

13. (SBU) Some progress was made during the year in addressing these remaining problems. The GOU established a special Music Industry Working Group that helped improve the regulatory environment for royalty collecting societies. The courts ruled that the National Radio Company must pay royalties to rights holders. Police

focused more attention on internet piracy, stepping up investigations of suspected pirate sites, and shutting a few down. Police also launched the first criminal case involving file downloading. Law enforcement officials uncovered a smuggling ring that imported pirated CDs and DVDs by rail from Russia. End Summary and Recommendation.

#### TRIPS Implementation

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¶4. (U) In the process of joining the WTO, which occurred on May 16, 2008, Ukraine made significant changes to its legal base in order to achieve TRIPS compliance. GOU officials have repeatedly stated, and experts generally agree, that Ukrainian legislation is now in line with TRIPS, although of course improvements could be made. The GOU plans to introduce amendments to Ukraine's law on geographical indications (GIs) to address some outstanding complaints from the EU. Although the Civil and Criminal Codes now give the GOU authority to destroy all counterfeit/pirated goods, the GOU still lacks the technical capability to make full use of this authority, and some industry reps have suggested that certain laws and regulations should be amended to clarify the government's authority to destroy (ref C).

#### Optical Media Piracy

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¶5. (U) Ukraine has one of the most comprehensive optical media laws in the world, regulating nearly every step in

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the life of an optical disc (OD). The 2002 OD law put into place a detailed regulatory regime, outlining a special OD plant licensing regime, plant inspection procedures, and measures to be taken when violations are discovered. A crucial package of amendments to the 2002 law and the Criminal Code of Ukraine, passed in the Rada (parliament) in 2005, improved inspection procedures and increased the penalties that apply to violations.

¶6. (SBU) Ukraine is no longer a major source of pirated optical media. Ignat Berezhny, Director of the IFPI-affiliated Ukrainian Association of the Music Industry, confirmed to Econoff on February 17 that industry specialists have not detected any pirated discs believed to be manufactured in Ukrainian OD plants since the 2005 amendments to the OD law. Berezhny noted that small scale CD-R burning operations remain common, however. Berezhny added that about 80 percent of pirated discs in Ukraine are imported from Russia. The State Department for Intellectual Property (SDIP) coordinates inspections of the seven OD plants operating in Ukraine, and GOU officials reported that they did not detect any signs of pirate production during their inspections in 2008.

¶7. (U) In October 2008, PM Yulia Tymoshenko created a governmental Music Industry Working Group tasked to draft legal and regulatory amendments of concern to music rights holders. Industry reported that the Working Group "facilitated and led to a series of high-level meetings with key Government officials resulting in formal and informal cooperation." The Working Group has already shown some positive results, particularly on collective management (see below).

¶8. (U) The hologram sticker program (ref I) remains the primary method used by law enforcement to recognize potentially pirated materials. Industry reps have complained about the functioning of this program. They say the procedures for acquiring stickers are time-consuming and bureaucratic, and they claim that some importers of pirated discs are able to obtain the hologram stickers. Counterfeit hologram stickers are also a problem. GOU officials recognize these problems but argue that

eliminating the program altogether would be a mistake. Article 203 of the Criminal Code provides law enforcement officials with some "ex officio" powers when they encounter suspected pirated products without a hologram sticker. Eliminating the hologram program could therefore serve to reduce law enforcement's authority to seize suspected pirated material, they argue. The GOU has drafted an amendment to the Law "On distribution of audiovisual works, phonograms, videograms, computer programs, and databases" that would partially address industry's concerns by requiring that all information concerning applications for hologram stickers be made publicly available on SDIP's official website.

#### Collective Management Problems

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¶9. (U) Ukraine's system of collective management functions imperfectly. Rights holders have complained that some royalty collecting societies collect fees for public use of copyrighted material without authorization and do not properly return royalty payments to rights holders, and that many local businesses simply do not pay at all. The music industry reports that only about 7% of the market is properly paying performance royalties.

¶10. (U) The GOU has recently made some progress in addressing collective management problems, however. SDIP's 2007 revocation of the operating license of rogue collecting society Oberih (ref K), hailed by industry reps as a major step forward, was upheld in 2008 both by the Court of First Instance and the Administrative Appeal Court. In addition, the Music Industry Working Group created by PM Tymoshenko developed several regulatory amendments (to Cabinet of Ministers Resolutions and to an Order of the Ministry of Education and Science) designed to

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neutralise rogue collecting societies by ensuring that only those organizations which formally represent the majority of rights in a specific sector will be allowed to collect under the principle of "extended licensing." The changes went into effect on January 22, 2009. Industry reps praised this move, saying it will "allow the societies supported by IFPI to strengthen their position in the market." In addition, the Ministry of Interior in January 2009 signed a Memorandum of Understanding on music piracy with the Ukrainian Association of the Music Industry, Ukraine's IFPI-affiliated industry association. The agreement calls for the Ministry to cooperate with industry to systematically tackle music piracy issues.

¶11. (U) Recently, industry reps have focused on the non-payment of broadcasting royalties by television and radio stations. Here too there has been some progress, as the royalty collecting society Ukrainian Music Alliance (UMA) brought a successful case against the National Radio Company of Ukraine (the biggest state-owned radio broadcaster) within the Kyiv Commercial Court. On December 12, 2008, the court ruled that the National Radio Company had to conclude a music rights licensing agreement with UMA, although an appeal is still pending. In addition, police opened a criminal case in early 2009 against several television channels in the western Rivne oblast for illegally re-broadcasting copyrighted material without paying royalties to the rights holders.

#### Internet Piracy

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¶12. (U) Internet piracy is a nascent and growing problem in Ukraine. Many Ukraine-based websites offer pirated material for download with the full knowledge of their Internet Service Providers (ISPs). Internet piracy rates are near 100 percent (i.e. virtually all downloads of music, movies, or software are from illegal websites).

Microsoft has also complained that Local Area Networks (LAN), some of which cover entire Ukrainian cities, allow for widespread software piracy. Another common type of Internet piracy is on-line mail order sites. Vladimir Iling, head of the Ukrainian Anti-Piracy Association, which represents MPA in Ukraine, told Econoff on February 26 that Ukraine remains a source of "camcorded" movies (i.e. illegal tapings of movies made in Ukrainian movie theaters) that are then posted to pirate download sites hosted throughout the world. Iling said that a draft law currently being considered by the GOU to make "camcording" a criminal offense was necessary to address this problem.

¶13. (SBU) Serhiy Lebid, Deputy Head of the Interior Ministry's Economic Crimes Department, told a meeting of the American Chamber of Commerce on February 18 that the GOU recognized the dangers of internet piracy and was trying to adapt its enforcement strategies to this new threat. Ministry of Interior officials previously had success only in stopping the mail order piracy and seemed unsure of how to address file sharing/downloading. Police have complained that Ukrainian law does not give them clear authority to shut down websites, and they instead have to work with sometimes uncooperative ISPs to do so.

¶14. (SBU) Some progress has been made, however. On February 11, 2009, the Ministry of Interior issued a press release regarding a recent campaign focusing on online piracy. The Ministry reported that it had investigated 71 Ukraine-based websites and, working with ISPs, shut down five sites hosting pirated material. (Comment: Because they were shut down without going through the courts, however, many of these sites could reappear on a new ISP or in a modified format. End Comment.) The Ministry of Interior also launched the first ever criminal case involving file downloading in 2008. (Note: The GOU has not provided much information regarding this case, as it remains open. We learned of the case from the police officer in the eastern city of Zaporizhya who was the primary investigator and happened to be a participant in a recent USG-sponsored training workshop (ref D). End note.)

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#### Data Protection -----

¶15. (U) Ukraine has improved its protection of undisclosed test data, such as that from drug trials, from unfair commercial use (TRIPS Article 39.3). After amendments made as part of WTO accession, Ukrainian law now provides a five-year period for the protection of undisclosed information in the course of registration of medical drugs and a ten-year period for agricultural chemicals. The Association of Pharmaceutical Research and Development (APRAD), which unites local representatives of large international pharmaceutical companies, has said it is generally satisfied with the law, but industry reps continue to complain of a lack of transparency by GOU bodies responsible for granting market approval for generic drugs (ref G). Post notes that the Pharmaceutical Research and Manufacturers of America (PhRMA) recommended that Ukraine not be listed on any of the Special 301 lists, indicating that there has been some improvement in this area.

#### Counterfeit Goods -----

¶16. (U) Counterfeit goods, including products that contain protected trademarks, remain readily available in Ukraine. Counterfeit apparel products are particularly common. Most counterfeit goods are not produced in Ukraine, but are imported. GOU officials have said that they believe most counterfeit products, especially apparel, are imported from China, with counterfeit pharmaceuticals coming more from

India, and IPR-infringing food products -- from Turkey.

#### Use/Procurement of Government Software

¶17. (SBU) The majority of GOU agencies, excluding those that handle sensitive national security or law enforcement material, continue to use unlicensed software on their computer systems. Industry estimates put the piracy level for government software at about 75%. The GOU launched a campaign back in 2004 to phase out illegal software at government agencies through annual inventories but has never followed through with the necessary funding. Microsoft cancelled a software legalization agreement with the government in 2006 as a result of noncompliance. GOU officials, particularly from SDIP and the Ministry of Interior, regularly express their commitment to legalization, but complain that the government continually fails to provide the necessary funding. With a severe budget crisis facing the government (ref B), we do not expect progress this year. Nikola Mircic, Microsoft Ukraine Anti Piracy Manager, told Econoff on February 23 that he appreciated the government's budget problems and would first push for legalization in Ukrainian educational institutions. (Note: Most Ukrainian universities and high schools are public. End note.) Microsoft could offer software to educational institutions at a steep discount, said Mircic, making legalization relatively cheap. Such a move would hopefully help generate momentum for a wider legalization effort.

#### Enforcement

#### Seizures/Prosecutions Steady, Quality over Quantity?

¶18. (U) After an explosion in the number of IPR-related investigations from 2005-2007, statistics from the Ministry of Interior for 2008 showed a leveling in terms of IPR cases filed and in seizures. The Ministry of Interior reported that there were 985 IPR-related criminal investigations in 2008, down some 7% from 2007. Out of those, 688 cases went to the courts (up 8% from 2007). During the first eight months of 2008, 120 cases resulted

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in convictions, compared to 186 for all of 2007. The number of IPR-related administrative offenses has remained steady at about 5,500 for 2008. Police seized a total of 1.1 million IPR-infringing goods, worth an estimated 19 million UAH (about 2.3 million USD) and down somewhat from 1.4 million items in 2007.

¶19. (U) Serhiy Lebid, Deputy Head of the Interior Ministry's Economic Crimes Department, told a meeting of the American Chamber of Commerce on February 18 that law enforcement was now focusing more on the "end result" -- i.e. securing convictions of serious offenders -- rather than on opening as many cases and seizing as many items as possible.

¶20. (U) SDIP is responsible for coordinating all IPR protection efforts, and in 2005 agreed to form an Enforcement Cooperation Group (ECG) jointly with the United States and with rights holders. The ECG met twice in 2008 and once so far in 2009 (refs C, E, and H). (Note: The GOU also conducts a biannual IP Dialogue with the European Union. End note.) SDIP has just one state inspector per oblast and must enlist the assistance of the Ministry of Interior to file criminal cases.

#### Courts Still a Problem



¶21. (SBU) The Ministry of Interior complains that too many IPR cases result only in small fines, ranging from 1700-3400 UAH (340-680 USD) for criminal cases. No one has yet to serve jail time in Ukraine for IPR crimes. Some judges, particularly in the regions, lack expertise on IPR issues and do not always take IPR crimes seriously. (Note: Post has expanded efforts to provide IPR training to the judiciary, through INL's IPR Enforcement Training Funds Program (refs F and J) and USPTO's Global Intellectual Property Academy. End note.)

¶22. (SBU) The Supreme Court has not held a coordination session on IPR crimes to issue clearer guidelines to the lower courts, and the lack of such guidelines has hurt enforcement. Ministry of Interior officials continue to urge the Supreme Court to do so.

#### Customs -----

¶23. (U) The State Customs Service has a separate division focusing on IPR enforcement and has established special IPR subdivisions at ports of entry and inland customs points. Amendments to the Customs Code made in 2004 empowered customs officers to impound illegal material at the border, but only if it was included in the "Register of Goods Containing Intellectual Property." Customs officials had also needed to refer impounded goods to the courts for an official determination as to whether they are counterfeit or not. A November 2006 amendment to the Customs Code, however, granted expanded "ex officio" powers, allowing customs officials to act on their own initiative without a right holder's claim or court decision. Vladimir Iling, from the Ukrainian Anti-Piracy Association, told Econoff on February 26 that police had recently filed a criminal case against a train conductor and a local supplier of pirated goods responsible for a major smuggling operation from Russia.

#### Notorious Markets - Petrivka -----

¶24. (SBU) Pirated and counterfeit products remain brazenly available at outdoor, open air markets that exist in many of Ukraine's larger cities. Kyiv's Petrivka Market, a massive open air market where as many as 300 stands may be selling illegal material at any given time, has long been a symbol of piracy in Ukraine. Although Ukrainian law enforcement has pushed most of the smaller vendors off street corners, Petrivka remains a sanctuary for all kinds of illegal, pirated goods, including music, films, games,

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and software. One barrier to enforcement, according to industry sources, is that the owners of pirate stalls are often influential businessmen with ties to local government. Law enforcement officials may be wary to undertake major operations against Petrivka without clear directives from the highest levels of the Government.

#### International Agreements -----

¶25. (U) Ukraine is a member of the Universal Copyright Convention, the Convention establishing the World Intellectual Property Organization (WIPO), the Paris Convention, the Madrid Agreement, the Patent Cooperation Treaty, the International Convention for the Protection of New Varieties of Plants, the Berne Convention, the Geneva Phonograms Convention, the Trademark Law Treaty, and the Budapest Treaty. Ukraine is a party to the 1996 WIPO Copyright Treaty (WCT), the WIPO Performances and Phonograms Treaty (WPPT), and the Rome Convention.

#### Comment: GOU Holding Steady -----

¶26. (SBU) In the aftermath of the 2004 Orange Revolution, Ukraine embarked on a major overhaul of its system of IPR enforcement, and went from the only country listed as a Priority Foreign Country in 2004 down to the Watch List in ¶2008. During that period, Ukraine successfully tackled the most critical IPR issues -- like shutting down pirated optical disc production and ensuring compliance with TRIPS. Ukraine, having completed this period of major reform, is now turning to more complicated and numerous IPR problems. Law enforcement is right to focus more attention on internet piracy and collective management problems, not just physical piracy. The police are also right to focus more on gaining convictions of the criminals behind the trade, rather than just issuing fines for low-level dealers. In short, continued progress on IPR enforcement should preclude Ukraine from returning to the Priority Watch List, but the GOU still has work to do before we should consider removing Ukraine from the Watch List altogether. End comment.

TAYLOR